Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-998

RODNEY A. LOGAL	PETITION FOR WRIT
Petitioner	OF CERTIORARI
VS	TO THE SUPREME
WILLIAM C. CRUSE,	COURT OF INDIANA
JERRY W. COOK,	
BILLY D. MARTIN,	CONSOLIDATED
RANDALL CZEKAJ	SUPREME COURT
Respondents	NO. 1077 S 746

Brief Of Respondent, William C. Cruse

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INDEX

		Page
I.	JURISDICTION	1
II.	CONSTITUTIONAL PROVISIONS AND TRIAL RULES	2
III.	QUESTIONS PRESENTED FOR REVIEW	13
IV.	STATEMENT OF THE CASE	14
	Petitioner's Complaint	14
V.	ARGUMENT	23
	I. THE QUESTIONS PRESENTED BY PETITIONER ARE CLEARLY UNSUBSTANTIAL IN THAT PREVIOUS DECISIONS OF THE UNITED STATES SUPREME COURT AND OTHER FEDERAL COURTS OF APPEAL CLEARLY SET FORTH THE UNSOUNDNESS OF THE PETITIONER'S POSITION	23
	II. THE DECISION OF THE SUPREME COURT OF THE STATE OF INDIANA IS SUPPORTED BY NONFEDERAL GROUNDS . .	38
VI.	CONCLUSION	40

TABLE OF CITATIONS

CASES: Page

Alexander's Estate v. Alexander, 138 Ind.App. 443, 212 N.E.2d 911 (1966) 33

Bank v. Bennett, ___ Ind.App. ___, 336 N.E.2d 663 (1975) 40

Clark County State Bank v. Bennett, ___ Ind.App. ___, 336 N.E.2d 663 (1975) 39, 40

Duncan v. Tennessee, 405 U.S. 127, 92 S.Ct. 785 31 L.Ed2d 86 (1972) . . 38

Farinelli v. Campagna, ___ Ind.App. ___, 338 N.E.2d 299 (1975) 39

Grant v. Grant, 141 Ind.App. 521, 230 N.E.2d 339 33

Hammond Packing Company v. Arkansas, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed 530 (1909) 23, 24, 25, 26

Hendricks v. Alcoa Steamship Co., 32 F.R.D. 169 (1963) 35

Henry v. State of Mississippi., 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed2d 408 (1965) 38

Herb v. Pitcairn, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed 789 (1945) . . 38

Link v. Wabash Railroad Company, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed2d 734, reh.den. 371 U.S. 873, 83 S.Ct. 115, 9 L.Ed2d 112 . . . 26, 27, 28, 29, 30, 36, 39, 40

Jankovick v. Indiana Toll Road Comm., 378 U.S. 487, 85 S.Ct. 493, 13 L.Ed2d 439 (1965) 38

CASES: Page

National Hockey League v. Metro. Hockey Club, Inc., ___ U.S. ___, 96 S.Ct. 2778, ___ L.Ed2d ___ (1976) 31, 32, 33, 35, 37

Societe Internationale Pour Participations Industrielles et Commerciales. S.A. v. Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed2d 1255 (1958) 31, 35

CONSTITUTIONAL PROVISIONS:

5th Amendment 36

14th Amendment 36

RULES OF COURT:

Trial Rule 37(b), Federal Rules of Civil Procedure . 3, 9, 13, 30, 31 32, 35

Trial Rule 37(d), Federal Rules of Civil Procedure . 3, 9, 13, 30, 31, 32, 35

Trial Rule 41, Federal Rules of Civil Procedure 27

Trial Rule 60(b), Federal Rules of Civil Procedure 3, 8, 29

Trial Rule 5(B), Indiana Rules of Trial Procedure 2, 19, 36, 40

Trial Rule 37(B), Indiana Rules of Trial Procedure . . 3, 6, 13, 30, 33, 35, 39, 40

Trial Rule 41, Indiana Rules of Trial Procedure 22

Trial Rule 60(B), Indiana Rules of Trial Procedure 3, 4, 21, 22, 29

IN THE
SUPREME COURT OF THE UNITED STATES

No. 77-998

RODNEY A. LOGAL Petitioner VS WILLIAM C. CRUSE, JERRY W. COOK, BILLY D. MARTIN, RANDALL CZEKAJ Respondents	PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA CONSOLIDATED SUPREME COURT NO. 1077 S 746

BRIEF OF RESPONDENT, WILLIAM C. CRUSE

I

JURISDICTION

The jurisdiction to review this cause on a Petition for Writ of Certiorari does not lie with this Court in that the decision of the Supreme Court of the State of Indiana is supportable as a matter of state law and, further, any question presented therein is not a substantial federal question as is required by the rules of this Court.

II

CONSTITUTIONAL PROVISIONS AND TRIAL RULES

In addition to the constitutional provisions and trial rules set forth by the petitioner in his Petition for Writ of Certiorari to the Supreme Court of Indiana, pages 4-6, Trial Rule 5(B) of the Indiana Rules of Civil Procedure is pertinent to the just adjudication of the issues involved therein. Trial Rule 5 of the Indiana Rules of Civil Procedure in pertinant part reads as follows:

> (B) Service: How made. Whenever a party is represented by an attorney of record, service shall be made upon such attorney unless service upon the party himself is ordered by the court. Service upon the attorney or party shall be made by delivering or mailing a copy of the papers to him at his last known address.
>
> (1) Delivery. Delivery of a copy within this rule means
>
> (a) handing it to the attorney or party;

(b) leaving it at his office with a clerk or other person in charge thereof, or if there is no one in charge, leaving it in a conspicuous place therein; or,

(c) if the office is closed, by leaving it at his dwelling house or actual palce of abode with some person of suitable age and discretion then residing therein.

(2) Service by mail. If service is made by mail, the papers shall be deposited in the United States mail addressed to the person on whom they are being served, with postage prepaid. Service shall be deemed complete upon mailing. Proof of service of all papers permitted to be mailed may be made by written acknowledgement of service, by affidavit of the person who mailed the papers, or by certificate of an attorney. It shall be the duty of attorneys when entering their appearance in a cause or when filing pleadings or papers therein, to have noted on the bench docket or said pleadings or papers so filed the address and telephone number of their office. Service by delivery or by mail at such address shall be deemed sufficient and complete.

In order to easily compare the provisions of Trial Rules 60(B) and 37(B) of the Indiana Rules of Civil Procedure to Trial Rule 60(b) and 37(b) and (d)

of the Federal Rules of Civil Procedure, respectively, each is set out herein. Trial Rule 60(B) of the Indiana Rules of Trial Procedure is as follows:

> (B) Mistake--Excusable neglect--Newly discovered evidence--Fraud, etc. On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order, default or proceeding for the following reasons:
>
> (1) mistake, surprise, or excusable neglect;
>
> (2) any ground for a motion to correct error, including without limitation newly discovered evidence, which by due diligence could not have been discovered in time to move for a motion to correct errors under Rule 59;
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) judgment by default was entered against such party who was served only by publication and who was without actual knowledge of the action and judgment, order or proceedings;
>
> (5) except in the case of a divorce decree, the record fails to show that such party was represented by a guardian or other representative, and if the motion asserts

and such party proves that

(a) at the time of the action he was an infant or incompetent person, and

(b) he was not in fact represented by a guardian or other representative, and

(c) the person against whom the judgment order or proceeding is being avoided procured the judgment with notice of such infancy or incompetency, and, as against a successor of such person, that such successor acquired his rights therein with notice that the judgment was procured against an infant or incompetent, and

(d) no appeal or other remedies allowed under this subdivision have been taken or made by or on behalf of the infant or incompetent person, and

(e) the motion was made within ninety [90] days after the disability was removed or a guardian was appointed over his estate, and

(f) the motion alleges a valid defense or claim;

(6) the judgment is void;

(7) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is

based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(8) any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2), (3) and (4) not more than one [1] year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or for fraud upon the court. Writs of coram nobis, coram vobist, audita querela, and bills of review and bills in the nature of a bill of review, are abolished and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Trial Rule 37(B) of the Indiana Rules of Civil Procedure is as follows:

(B) Sanctions--Contempt, damages and default. To avoid abuse of discovery proceedings and to secure enforcement of the discovery provisions of these rules in any enforcement or protective proceedings under the discovery provisions of

these rules or upon motion and notice by a party, witness or person to any persons affected thereby:

(1) The court may enforce the attendance of witnesses by attachment, and punish disobedience of a subpoena or order issued or made under these discovery rules as a contempt of court in the manner as provided in Rule 45(F).

(2) The court may allow expenses, including reasonable attorney's fees, incurred by a party, witness or person, against a party, witness or person, responsible for unexcused conduct that is:

(a) punishable for disobedience of a subpoena or order under subdivision (B) (1) of this rule; or

(b) in bad faith and abusively making or seeking a deposition, interrogatories, production of evidence, inspection, examination, request, question, enforcement order, subpoena, protective order or any other remedy under the discovery provisions of these rules; or

(c) in bad faith and abusively resisting or obstructing a deposition, interrogatories, production of evidence, inspection, examination, request, question, enforcement order, subpoena, protective order or any other remedy under the discovery provisions of these rules.

(3) The Court may order evicence upon matters to be taken as established or may order that evidence upon matters be refused as against a party subject to subdivision (B) (2) of this rule.

(4) The court may enter total or partial judgment by default or dismissal with prejudice against a party who is responsible under subdivision (B) (2) of this rule if the court determines that the party's conduct has or threatens to so delay or obstruct the rights of the opposing party that any other relief would be inadequate.

Trial Rule 60(b) of the Federal Rules Civil Procedure is as follows:

(b) Mistakes; inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged,

or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C.., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Trial Rules 37 (b) and (d) of the Federal Rules of Civil Procedure are as follows:

(b) Failure to Comply with Order.

(1) Sanctions by court in District Where Deposition is Taken.

If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31 (a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the

action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A) (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

***

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6)

or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B) and (C) of subdivision (b) (2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

III

QUESTIONS PRESENTED FOR REVIEW

1. Whether a substantial federal question is presented when the petitioner's personal injury action was dismissed with prejudice at the trial level pursuant to Trial Rule 37(B) of the Indiana Rules of Trial Procedure which is comparable to Rule 37 of the Federal Rules of Civil Procedure, due to his or his counsel's thwarting of the discovery process by refusing to allow the deposition of the petitioner's treating physician at the eleventh hour after considerable notice had been given of the pending deposition and, further, after the petitioner's or counsel for the petitioner's failure to timely pay the attorneys' fees of the counsel for the defendants incurred during their attempts to obtain the relevant and necessary discovery as ordered by the Trial Court.

2. Whether this Court lacks jurisdiction to review the matters asserted by the petitioner on the basis that the decision of the Supreme Court of the

State of Indiana is supported by non-federal grounds.

IV

STATEMENT OF THE CASE

The facts as set forth by the petitioner in the opinion of this respondent, do not fully set forth all the pertinent facts necessary for a just review of the petition of the petitioner for a Writ of Certiorari. In light of this, this respondent will set forth a statement of the case containing additional facts not included in the petitioner's statement of the case.

On or about May 6, 1971, the petitioner filed in the Lake Superior Court, Room No. 5, Hammond, Indiana, under Cause No. 571-331, the following Complaint, which omitting captions and signatures, reads as follows:

> Comes now the plaintiff and for cause of action alleges and says:
>
> (1) On Wednesday, May 14, 1969, at approximately 6:30 A.M., the plaintiff was traveling North on Cline Avenue in Hammond approaching the Tri-State intersection. Plaintiff was operating a Buick automobile.

(2) Plaintiff came to a stop, in a fog, waiting for traffic to move ahead. While in a stationary position, his automobile was struck in the rear with great force and violence by defendant Billy D. Martin. Martin, in turn, was struck by another car operated by Randall Czekaj.

(3) The plaintiff was severely injured in the collision due to the negligence of the defendants, and each of them, in operating at a high and excessive rate of speed, considering the weather condition, and not having their vehicles under control so as to avoid colliding with each other and colliding with the plaintiff.

Plaintiff at the time was employed as a mechanic at the Inland Steel Company getting Thirty Dollars ($30.00) per day. He has been unable to work since the accident and will be disabled during the remainder of his life.

In addition, he has incurred medical and hospital bills of approximately Five Thousand Dollars ($5,000.00).

WHEREFORE, plaintiff prays judgment against the defendants in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) for his costs expended and/or all other just and proper relief.

Thereafter, the cause was venued to

the Porter Superior Court sitting at Valparaiso, Indiana, under Cause Number 71-PSC-1734. In the course of the discovery proceeding, interrogatories were propounded to the petitioner, Rodney A. Logal, and answered by the same. In his answers to interrogatories, Mr. Logan stated that Dr. Bernardo Saavedra treated him for the alleged serious and permanent personal injuries incurred as a result of the automobile collision upon which his complaint is based. In addition, at a later point in time, the petitioner signed a medical authorization releasing Dr. Bernardo Saavedra to give evidence of his treatment and findings to the respondents in this cause.

Thereafter, on July 19, 1972, the first notice of deposition of Dr. Saavedra, returnable on August 7, 1972, was served on all counsel of record. The deposition of that date was canceled and repeated attempts were made to reset the deposition at the convenience of all counsel and Dr. Saavedra.

On January 5, 1973, notice of Dr. Saavedra's deposition was again served

upon all counsel of record by certificate of service, returnable on January 26, 1973. The record indicates that the petitioner's counsel received said notice of deposition on January 8, 1973. On January 25, 1973, between the hours of 3:30 p.m. and 4:00 p.m., Billy D. Martin's counsel, Fred M. Stults' received a telephone call from an individual identifying himself as Mr. Brown from the petitioner's counsel's office who stated that Attorney Crumpacker, counsel for the petitioner at that time, was going to file some objections to the taking of Dr. Saavedra's deposition. Attorney Stults advised Mr. Brown that unless the Judge or Court ordered otherwise, Dr. Saavedra's deposition would proceed as scheduled.

Dr. Saavedra's office also was notified on January 25, 1973 by a telephone call from the office of Attorney Crumpacker and was advised by the individual speaking not to proceed with the deposition because Mr. Owen M. Crumpacker had filed a Motion to Quash. The Motion to Quash was served for the first time

on Dr. Saavedra on January 26, 1973, the day of the scheduled deposition.

On January 26, 1973, Dr. Saavedra was served by Attorney Fred M. Stults with an ordinary Witness Subpoena and, pursuant to notice, the attorneys for the various defendants and the court reporter appeared at Dr. Saavedra's office to take the doctors deposition. Mr. Brown of Attorney Crumpacker's office was also in attendance and at that time again instructed Dr. Saavedra not to testify. Mr. Brown was not an attorney but merely a lay person in the employ of Attorney Crumpacker. The counsel of record for Rodney A. Logal did not appear, nor make any attempt to appear.

Based upon Mr. Brown's assertions and the advice of his own counsel, Dr. Saavedra refused to give testimony at the deposition.

On March 6, 1973, the defendant, Billy D. Martin, filed a Motion to Compel Discovery and for Sanctions against the petitioner and Dr. Saavedra. In this motion, the counsel for the defendant set out the reasons for sanctions

against the plaintiff and Dr. Saavedra. The motion contained a schedule of time showing fifteen hours spent by defendant Martin's attorney. The time schedule was submitted in support of a request for attorney's fees and costs.

This motion was assigned for hearing and oral argument on September 19, 1973, by the Honorable Bruce W. Douglas, Judge of the Porter Superior Court. On September 17, 1973, just two days prior to the day of hearing for the Motion to Compel Discovery and for Sanctions, the Court, at the petitioner's request, continued said hearing and on September 18, 1973, the Court reset said matter for hearing on October 26, 1973. Both by the plaintiff's counsel's own testimony and by the record itself, it is clear that a notice of the hearing of October 26, 1973 was served upon the plaintiff's counsel by mail as provided for in Rule 5(B)(2) and received by said counsel's office on September 24, 1973.

On October 26, 1973, all of the counsel for the defendants appeared in Court to argue the Motion to Compel

Discovery and for Sanctions. William C. Cruse appeared by his attorney, Karen Hughes; Billy D. Martin appeared by his attorney, Fred M. Stults; and Randall Czekja appeared by his attorney, Rudy Lozano. Dr. Saavedra appeared in person and with his counsel, Martin Kinney of Gary, Indiana. Plaintiff did not appear in person or by counsel. At the hearing, the motion of the defendant Billy D. Martin was orally joined by all defense counsel of record.

After evidence and arguments were concluded, the Court entered an Order finding that the plaintiff "through its attorney has substantially failed to comply with the Indiana Rules of Civil Procedure and that said failure has not been in good faith." (Petitioner's A., pp. 1-2). The Court granted to the defendants' counsels of record $1,200 in attorneys' fees to be paid by the plaintiff or the plaintiff's counsel on or before November 7, 1973. The Court further held that in the event the plaintiff or the plaintiff's counsel failed to comply with its order on or before

November 7, 1973, the Court would enter an "Order of Dismissal" with prejudice against the plaintiff. (Petitioner's A. pp. 1-2).

A copy of the Court's Order of October 26, 1973, was served upon the petitioner's counsel of record and received by him on October 27, 1973. At no time prior to November 7, 1973, did the counsel for the petitioner or the petitioner pay the attorneys' fees as ordered by the Court or take any other affirmative action. On November 9, 1973, the Trial Court entered an Order of Judgment of Dismissal with Prejudice. (Petitioner's A. pp. 2-3). On December 21, 1973, plaintiff filed the following Motion:

> PLAINTIFF'S MOTION TO VACATE AND SET ASIDE THE ENTRY OF NOVEMBER 9, 1973 UNDER TRIAL RULE 55, TRIAL RULE 60(B), BURNS' 2-1069 AND/OR IN THE ALTERNATIVE TO CORRECT ERRORS UNDER TRIAL RULE 59.

The Court heard arguments on the petitioner's Motion on March 14, 1974. At that time, the counsel for the petitioner stated, " . . . and of course the last guys I would ever pay is to

pay an insurance company's lawyers . . . ." He further stated, " . . . but, the last thing in the world I would do would be to contribute to the ruination of the law practice by contributing $1,200 to an insurance company's counsel . . . ."

The Court took the matter under advisement and at the request of the petitioner's counsel, granted the petitioner leave to submit a brief. The petitioner failed to file a brief with the Court and on April 9, 1974, the Court entered an Order denying the petitioner's motion of December 21, 1973. Thereafter, the petitioner appealed this cause to the Court of Appeals of Indiana.

Some months after the submission of the cause to the Appellate Tribunal of the State of Indiana, the petitioner retained new counsel and filed in the Trial Court on December 13, 1974, a Petition to Reinstate based upon Rules 60 and 41 of the Indiana Rules of Trial Procedure. After the hearing, the Trial Court denied the petitioner's motion of December 13, 1974.

ARGUMENT

I. THE QUESTIONS PRESENTED BY PETITIONER ARE CLEARLY UNSUBSTANTIAL IN THAT PREVIOUS DECISIONS OF THE UNITED STATES SUPREME COURT AND OTHER FEDERAL COURTS OF APPEAL CLEARLY SET FORTH THE UNSOUNDNESS OF THE PETITIONER'S POSITION.

The petitioner only cited three cases in support of his contentions. The first of those being Hovey v. Elliot, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed 215 (1897). In that cause, at the state trial level, the defendant's answer was stricken and a judgment entered against him because of his failure to obey an order of the Court during the pendency of the suit. This Court held that it was a denial of due process of law to render a decree on the merits without any hearing whatever. However, Hovey was modified by this Court in Hammond Packing Company v. Arkansas, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed 530 (1909).

The Hammond decision arose out of an action under a state antitrust law. In the action, the defendant company refused to produce books, papers,

and witnesses as the Court ordered. The Court's order was pursuant to state statute. The company purposely refused to comply with the requested discovery based upon the fact that they felt that the act and the trial rules which authorize such discovery were repugnant to the Constitution of the United States. Id. at 330.

This Court held that where there is a refusal to produce material evidence to a defense or claim, as the case may be, it is deemed to be an admission of the particular claim or defense to which the requested evidence is relevant. On the other hand, Hovey v. Elliot involved a denial of the right to defend as a matter of mere punishment. The following is the Court's analysis of the distinction between the two cases.

> Hoovey v. Elliot involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession, and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the undoubted

right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in Hoovey v. Elliot, and the power exerted in this, is as follows: In the former, due process of law was denied by the refusal to hear. In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to due process, to preserve in the one and to apply and enforce in the other. Id. at 350-351.

In this cause as in the Hammond decision, refusal to produce necessary and relevant discovery was the main topic of concern at the October 26, 1973 hearing. The testimony of Dr. Saavedra,

a treating physician of the petitioner, was pertinent to the determination of the cause and extent of injury, if any, incurred as a result of the automobile collision set forth in the plaintiff's Complaint. As this Court can ascertain from the reading of the body of the Complaint set out in full in this respondent's Statement of the Case, (pp. 14-15), the damages claimed all rest on the same theory, that being that the petitioner incurred severe personal injuries. It cannot be argued that the deposition of Dr. Saavedra was not pertinent and material to the claim for relief of the petitioner. Therefore, it follows from the Hammond decision that the refusal to allow this discovery was "an admission of the want of merit" in the asserted claim. Id. at 351.

The last case relied upon by the petitioner is that of Link vs. Wabash Railroad Company, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed2d 734, reh.den. 371 U.S. 873, 83 S.Ct. 115, 9 L.Ed.2d 112. This case originated out of the 7th Circuit Court of Appeals. The cause of action

was the oldest case on the court docket.

After repeated delays, the Court dismissed the case with prejudice when the plaintiff's counsel failed to appear at a pre-trial conference without justifiable excuse. The Trial Court dismissed the case on the bases of Federal Rules of Civil Procedure Rule 41(b) for failure to prosecute. In granting certiorari, this Court stated that "[t]he power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts." Id. at 629-630.

In discussing the requirements of due process, this Court stated that "[t]he adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. Id. at 632.

This Court ruled, therefore, that the Trial Court had the power to dismiss a complaint based upon the failure to

prosecute, even though no notice of its intention to do so was provided nor was an adversary hearing conducted before the action was taken. The only reviewable question before the Court was whether or not the trial court acted within the "permissible range" of its discretion. Id. at 633.

In our fact situation, the actions of the petitioner or that of his counsel substantially delayed the proceedings of the cause. At the hearing of October 26, 1973, one defense counsel alone had a time record showing that he had spent fifteen hours in attempting to arrange for the deposition of Dr. Saavedra. However, unlike the peitioner in Link, Mr. Logal was afforded a hearing with adequate notice. This hearing was even delayed at the request of the counsel of the petitioner. Notwithstanding this, neither the petitioner or his counsel chose to attend.

In order to give the petitioner every opportunity to proceed with his case on the merits, the Court ruled on the date of the hearing in question,

October 26, 1973, that provided that the petitioner, or the counsel for the petitioner, pay the defense counsels' attorney fees that were incurred as a result of the delays caused by his action within thirty days from the date of the hearing, the petitioner could proceed on the merits of his cause of action. However, once again, the order was not complied with.

The petitioner attempts to distinguish the Link decision from the instant fact situation in two regards. The first contention will be handled at a later point in this brief. The second contention revolves around the fact that in the instant case a Trial Rule 60(B) Motion was filed but in Link such a motion was not filed. Trial Rule 60(b) of the Federal Rules of Civil Procedure is substantially similar in pertinent part to Trial Rule 60(B) of the Indiana Rules of Trial Procedure. (pp. 8-9, 4-6). Link does not hold that if a 60(b) Motion was filed, such a motion would have been granted. Rather, Justice Harland, delivering the opinion of the Court, states that such

a motion would only serve to determine whether or not the counsel's failure to attend the pre-trial conference was "other than deliberate or the product of neglect." Id. at 636.

In our fact situation, two Trial Rule 60(B) Motions were filed, and hearings held on two separate occasions, but on neither occasion was it shown that the counsel for the petitioner failed to receive adequate notice of the hearing of October 26, 1973 or of the Court's ruling of that date. In fact, the counsel for the petitioner stated in open court that the failure to comply with the Court's order of October 26, 1973 was a deliberate action on his part.

(Quotes of his statements to the Court are contained on pages 21 through 22 of this respondent's Statement of the Case.)

Rule 37(B) of the Indiana Rules of Trial Procedure provides the same relief for the abuse of or the obstruction of discovery proceedings as those provided for in Rules 37(b) and (d) of

the Federal Rules of Civil Procedure. (pp. 6-8, 9-12.)

In interpreting, reviewing and applying Rule 37 of the Federal Rules of Civil Procedure to individual District Court's actions thereunder, this Court has held as recently as June of 1976, that the only question is whether the Court abused its discretion in the actions taken. National Hockey League v. Metro. Hockey Club, Inc., ___ U.S. _____, 96 S.Ct. 2778, ____ L.Ed2d (1976). When the extreme action of dismissal under Rule 37 is taken by the trial court, this Court seems to require a bad faith action on the part of the remiss party or his counsel, rather than a showing of an inability to comply with the Court's discovery order dispite good faith. National Hockey League v. Metro. Hockey Club, Inc., Supra; Societe Internationale Pour Participations Industrielles et Commerciales, S.A., v. Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed2d 1255 (1958).

Based upon the fact that crucial interrogatories were outstanding for

17 months due to defense counsel's many requests for extensions of time at the eleventh hour and past the eleventh hour, accompanied by warnings of the Court that their failure to provide certain information by a certain date would result in sanctions under Rule 37, and finally that the interrogatories when filed were not adequate, the Trial Court in National Hockey League ruled that:

> The conduct of the plaintiff's demonstrates the callous disregard of responsibilities counsel owe to the Court and to their opponents. Id. at 2779.

It characterized the counsel's actions as "flagrant bad faith", " . . . when after being expressly directed to perform an act by a date certain, viz., June 14, 1974, they failed to conform and compounded that noncompliance by waiting until five days afterwords before they filed any motions." Id. at 2779-2780.

On review, this Court held as follows:

> The question, of course, if not whether this Court or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District

Court abused its discretion in so doing. E.g., Wright & Miller, Federal Practice and Procedure: Civil §2284 at 765; General Dynamics Corp. v. Selb Mfg. Co., 48 F.2d 1204, 1211 (CA 8, 1973); Baker v. F & F Investment, 470 F2d 778, 781, (CA 2, 1972). Id. at 2780.

As is readily ascertainable from the reading of Trial Rule 37(B) of the Indiana Rules of Trial Procedure, in Indiana the imposition of sanctions by a trial court judge is also discretionary. The Trial Rule commences with the phrase "the court may." (pp. 6-8). Therefore, by the very terms of the Rule, such an imposition of sanctions by an Indiana Trial Court is discretionary with the trial court judge.

A long line of Indiana cases have held that the exercise of discretion by the trial court is not reviewable, it is only the abuse of the power which is reviewable on appeal. Grant v. Grant, 141 Ind.App. 521, 230 N.E.2d 339 (1967); Alexander's Estate v. Alexander, 138 Ind.App. 443, 212 N.E.2d 911 (1966). The Supreme Court of the State of Indiana held that in the instant case there was no abuse of discretion in dismissing

this action. Logal v. Cruse, ___ Ind. ____, 268 N.E.2d 235 (1977). (Petitioner's A. pp. 38-39).

The Trial Court specifically set forth in its order of October 26, 1973, that the petitioner through his attorney had not acted in good faith. (Petitioners A. p. 1.) There are many facts to substantiate this finding, i.e. the timeliness of the filing of the Motion to Quash, as well as the manner in which the deposition was physically disrupted; and the failure of the counsel for the petitioner or the petitioner to appear at the hearing on the Trial Rule 37 Motion after the same had been continued for the convenience of the petitioner's counsel at his request. Thereafter, the bad faith actions of the petitioner and his counsel continued with the refusal to comply with the Trial Judge's order to pay the attoneys' fees within the thirty day limitation, in fact no affirmative actions were taken within the thirty days, and finally after the entering of the Order of Dismissal by the Trial Court on November 9, 1973, the failure

of the counsel of the petitioner to file any motions to vacate said order until 42 days after the entry of the final Order of Dismissal. A Court would be hard pressed to find that the petitioner, through his counsel, acted in good faith herein or that the Court abused its discretion in entering the Orders of October 26, 1973 and November 9, 1973. (Petitioners A. pp. 1-3).

As in Indiana, Rule 37 of the Federal Rules of Civil Procedure, " . . . allows a Court all the flexibility it might need in framing an order appropriate to a particular situation." Societe Internationale v. Rogers, Supra at 208. See also, National Hockey League v. Metro. Hockey Club, Inc., Supra; and Hendricks v. Alcoa Steamship Co., 32 F.R.D. 169 (1963), (where a Court awarded attorney's fees as a condition of reinstatement of cause after a Rule 37 dismissal). In that Rule 37 of the Federal Rules of Civil Procedure and Rule 37 of the Indiana Rules of Trial Procedure by their language contemplate flexibility in the framing of an Order

to fit a particular situation, the first attempt to distinguish the decision of Link v. Wabash Railroad Company, Supra. by the petitioner on pages 12-13 of his Petition is unfounded.

Finally, the petitioner asserts that his constitutional rights under the 5th and 14th Amendments were violated because he did not receive personal notice of the Court's Orders of October 26, 1973 and November 9, 1973. There is no question that in all instances petitioner's counsel received notice as provided for in Rule 5(B) of the Indiana Rules of Trial Procedure, the constitutionality of which is not contested by the petitioner. (pp. 2-3).

This Court held that "[t]here is certainly no merit to the contention . . ." Link v. Wabash, Supra. at 633. The Link Court specifically stated as follows:

> Petitioner voluntarily chose his attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of his freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer--agent

and is considered to have "notice of all facts, notice of which can be charged upon the attorney." Smith v. Ayer, 101 U.S. 320, 326, 25 L ed 955, 958. Id. at 633-634

By footnote, this Court further explained its position and the basis of the same as follows:

> And if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. But keeping this suit alive merely because plaintiff should not be penalized for the admission of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant. Moreover, this Court's own practice is in keeping with this general principal. For example, if counsel files a Petition for Certiorari out of time, we attribute the delay to the petitioner and do not request an explanation from the petitioner before acting on the petition. Id. at 634, n. 10.

In keeping with the Link decision, the Court in National Hockey League v. Metro. Hockey Club, Inc., Supra., impliedly held the petitioner bound by the action of its counsel in failing to timely respond to the Court's orders. It is, therefore, this respondent's

position that the petitioner's remedy, if any, lies not in this Court but rather against his attorney of record at the times in question.

II. THE DECISION OF THE SUPREME COURT OF THE STATE OF INDIANA IS SUPPORTED BY NONFEDERAL GROUNDS.

This Court lacks jurisdiction to review a decision of a state court based upon nonfederal grounds. Jankovich v. Indiana Toll Road Comm., 379 U.S. 487, 85 S.Ct. 493, 13 L.Ed2d 439 (1965). See also Duncan v. Tennessee, 405 U.S. 127, 92 S.Ct. 785 31 L.Ed2d 86 (1972); Henry v. State of Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed2d 408 (1965); Herb v. Pitcairn, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed 789 (1945). If the procedural rules involved serve a legitimate state interest, the case is not subject to review by this Court. Henry v. State of Mississippi, Supra.

In the case of Duncan v. Tessessee, Supra., the defendants were convicted of armed robbery and they appealed. This Court granted certiorari to consider the questions seemingly presented under the constitutional guarantee

against double jeporady. But after briefing and oral argument, the Court held that such questions were so interrelated with the rules of criminal pleading peculiar to the State of Tennessee, the constitutionality of which was not at issue, as not to warrant the exercise of certiorari jurisdiction of the Court. Similarly, in our fact situation, the constitutionality of the Indiana Trial Rules involved is not at issue and are so intricately woven with the claims of the petitioner as not to warrant the extension of certiorari jurisdiction.

As the Indiana Court of Appeals pointed out in their review of this case, the trial court was not only motivated by Trial Rule 37(B) but also by the petitioner's failure to properly prosecute the claim. For as this Court noted in Link v. Wabash Railroad Company, Supra.,

> The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the [Courts]. Id. at 629-630 cited in Farinelli v. Campagna, ____ Ind.App. ____ 338 N.E.2d 299,300 (1975). See also Clark County State

Bank v. Bennett, ____ Ind.App. ____, 336 N.E.2d 663 (1975).

In addition to docket control and the speedy disposition of cases, the rights of the defendants must be considered as well as those of the petitioner. For as it is stated by this Court in Link, "the sins of the plaintiff's lawyers should not be visited upon the defendant." Supra. at 634, n. 10. Therefore, legitimate state interests are served by Trial Rules 5(B) and 37(B).

VI

CONCLUSION

Wherefore, for the reasons set forth in the above argument, this respondent requests that the United State Supreme Court deny the petitioner's Petition for Writ of Certiorari to the Supreme Court of Indiana.

Respectfully submitted,

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